Supreme Court, U.S.
FILED
SEP 1 6 2003
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No. 03-138 (2)

IN THE

Supreme Court of the United States

HANS MARTICIUC, *et al.*,
Petitioners,

v.

CITY OF HOUSTON, TEXAS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This case presents the question of whether an employer may deny a request to use accrued compensatory time under the 1985 Amendments to the Fair Labor Standards Act, 29 U.S.C. § 207(o), pursuant to a system under which the employer grants time off after the time off requested by the employee but within a reasonable period *(employer designation)* or whether the employer rather must grant the specific time off requested by the employee unless doing so would cause undue disruption *(employee choice)*.

Certiorari should be granted in this case because the Fifth Circuit in its decision below adopted the *employer designation* approach, which is in direct conflict with the *employee choice* approach applied by the United States Department of Labor outside the Fifth Circuit and applied by district courts in Massachusetts, Wisconsin, North Carolina, Virginia and California. Petition at 6-13. Moreover, the conflict between the Fifth Circuit's decision below and the Sixth Circuit's plurality decision in *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999), which adopted a third *collective bargaining deferral* approach, creates a conflict between the Circuits. Petition at 4-6. The Sixth Circuit currently has pending a case raising the same issue. Oral argument before the Sixth Circuit is scheduled for October 23, 2003.

The Ninth Circuit also now has before it a case that raises the question of the proper rule to apply to employee requests for use of accrued compensatory time. The Sacramento Police Department has a policy of denying police officers' requests for compensatory time off if granting the request would require paying another officer overtime. Requests for compensatory time off are denied even where granting the request would not cause any undue disruption to the police department's operations. In *Mortensen v. County of Sacramento*, Civ. S-01-0782, the U.S. District Court for the Eastern District of California held that Sacramento's policy did not violate the FLSA. Officer Mortensen has now appealed that decision to the U.S. Court of Appeals for the Ninth Circuit. The District Court's order and judgment are attached hereto as Appendix A; Officer Mortensen's Notice of Appeal is attached hereto as Appendix B.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

[Filed Jan. 16, 2003]

No. CV S-01-0782 GEB DAD

RONALD MORTENSEN,[1]

Plaintiff,

v.

COUNTY OF SACRAMENTO,

Defendant.

ORDER

Both parties seek summary judgment. Defendant County of Sacramento argues that Plaintiff Ronald Mortensen lacks standing to bring this Fair Labor Standards Act ("FLSA") lawsuit, or alternatively, that its manner of granting Compensatory Time Off ("CTO") is valid under the Collective Bargaining Agreement ("CBA") and the FLSA.[2] The essence of Mortensen's argument is that he can use his CTO when he desires unless the County shows granting his

---

[1] The correct spelling of Plaintiff's name is unclear since it is spelled two ways in the Complaint. The spelling used in this Order reflects the spelling in the caption of the Complaint.

[2] Counsel took the position at the hearing on the motions that the dispute concerning agreements in the CBA regarding the use and preservation of CTO are justiciable even though the CBA expired June 30, 2002. Since negotiations on a new CBA are pending, the expired CBA remains in effect. *California State Employees' Assn. v. Public Employment Relations Bd.*, 51 Cal. App. 4th 923, 936-37 (1996).

request would "unduly disrupt the operations" of the County's Sheriff's Department. Mortensen contends this undue disruption standard, prescribed in 29 U.S.C. § 207(o)(5), governs the injunctive relief he seeks and requires the County to allow him to take CTO when he desires if the only reason for denial of his request is that the County will have to pay another employee overtime.

BACKGROUND

Mortensen is a deputy sheriff employed by the County at Rio Consumnes Correctional Center ("RCCC"). (Def.'s Undis. Facts ¶ 1.) The CBA between the County and the Sacramento County Deputy Sheriff's Association provides that "except as provided herein, an employee shall be compensated for such overtime worked with compensatory time off at the overtime pay rate at the discretion of the employee." (Def.'s Mot. Ex. C at 18.) The CBA also provides: "[CTO] shall be used within one year from the time overtime was performed. If [the County] is unable to schedule and grant the [CTO] within one year, cash payment shall be made in lieu of [CTO]." (*Id.*)

For years predating the effective CBA, the County has maintained a leave book, to be used for deputy sheriffs requesting to take CTO on a particular day. (Def.'s Undis. Facts ¶¶ 21-22, 28.) In 1996, the County adopted a General Order leave of absence policy which contains the following provision on CTO:

> DIVISION COMMANDERS SHALL SCHEDULE C.T.O. CONSISTENT WITH THE DEPARTMENT'S OPERATIONAL REQUIREMENTS. THIS SCHEDULING AUTHORITY IS DELEGATED DOWN TO AND INCLUDING FIRST LINE SUPERVISORS, SUBJECT TO DIVISION COMMANDER'S CONCURRENCE. C.T.O. NOT USED WITHIN ONE YEAR FROM THE DATE EARNED SHALL BE PAID OFF IN CASH IN LIEU OF TIME OFF.

(Def.'s Mot. Ex. E. at 3.)

The leave book has three slots available for each weekday, and four slots available for each weekend day. (Pl.'s Undis. Facts ¶ 12.) A deputy sheriff may request CTO leave by having his or her name placed in a leave book slot no more than sixty days in advance of the requested CTO date. (Pl.'s Undis. Facts ¶ 15.) If a deputy sheriff requests CTO for a day on which the leave book slots have been filled, the request will be denied regardless of the availability of another deputy sheriff to work overtime so that the request could be granted. (Pl.'s Undis. Facts ¶¶ 16, 34.) The leave book is calculated to assist the administrative sergeant "to know how many positions he must fill to complete the mission of the day . . . [and to] allow time off." (Def.'s Mot. Ex. I at 12.)

On February 26, 2001, Mortensen requested CTO leave for March 11, 2001, but his request was denied because the leave book was full that day. (Def.'s Undis. Facts ¶ 31; Def.'s Mot. Ex. F.) In the sixty day period following February 26, 2001, eighteen other days were available on which Mortensen could have used CTO. (Def.'s Undis. Facts ¶ 34.)

DISCUSSION

The County argues that Mortensen lacks standing to pursue this action because Mortensen could have used his CTO on one of the available eighteen days; thus he has suffered no injury. To meet the standing requirement, Mortensen "must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1970). Since Mortensen contends that the putatively illegal leave book policy presents him with threatened injury, he has standing.

Mortensen argues, notwithstanding negotiated provisions in the CBA concerning CTO and the County's leave book practice, his request for use of his CTO on a specific date "triggered" § 207(o)(5), "and the County had a duty to grant

the request unless doing [so] would have unduly disrupted the Department's operation." (Pl.'s Opp'n to Def.'s Mot. for S.J. at 7.) Section 207(o)(5) reads:

> An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—
>
> (A) who has accrued [CTO] authorized to be provided under paragraph (1), and
>
> (B) who has requested the use of such [CTO], shall be permitted by the employee's employer to use such [CTO] within a reasonable period after making the request if the use of the [CTO] does not unduly disrupt the operations of the public agency.

Mortensen's argument that the "unduly disrupt" term in § 207(o)(5) means he must be given his chosen CTO day off if the only reason given for denial of it is the payment of overtime to another employee was rejected in *Aiken v. City of Memphis, Tennessee*, 190 F.3d 753, 756 (6th Cir. 1999), as follows:

> The Act imposes several conditions on a public agency's ability to offer [CTO] . . . . Two are relevant for the purposes of this case. First, an employer may grant [CTO] in lieu of overtime pay pursuant only to a collective bargaining agreement, or other agreement. See Section 207(o)(2)(A). Second, an employee "shall be permitted by the employee's employer to use such [CTO] within a reasonable period after making the request if the use of the [CTO] does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5).
>
> The plaintiffs' argument focuses on the phrase "unduly disrupt" in § 207 (o)(5). They begin by arguing that § 207(o)(5) requires an employer to grant an employee's reasonably timed request for the use of banked [CTO], unless the use of the [CTO] would be unduly disruptive .

> . . . The city, however, acknowledges its policy is not to grant overtime pay to one officer so that another can use [CTO] on a requested date. Plaintiffs contend that the payment of overtime to an officer so that another can use banked [CTO] is not an undue disruption . . . . Plaintiffs conclude, therefore, that the city violates the Act by shutting the logbooks not at the point of undue disruption, but rather at the point at which a precinct would begin having to pay replacement officers on an overtime basis.
>
> * * *
>
> The fundamental defect in the plaintiffs' position, however, is that it completely ignores the phrase 'reasonable period,' which the Act gives the parties the freedom to define.

Mortensen disagrees with the conclusion in *Aiken* that Congress intended § 207 (o)(5) to provide parties flexibility in determining what constitutes a "reasonable period," arguing that the construction of this phrase given in *DeBraska v. City of Milwaukee*, 131 F. Supp. 2d 1032, 1034 (E.D. Wis. 2000) should be followed. In *DeBraska* the Secretary of Labor, through an amicus brief, said the term "reasonable period" in § 207(o)(5) means "that the employee must give adequate notice that he wants to use [CTO] on a particular day, thereby giving the employer time to plan and to determine whether the request can be granted." *Id.* In reaching its conclusion, the *DeBraska* court quotes from

> [a]n August 19, 1994 opinion letter of the Department's Wage and Hour Administrator [which] provides that [¶] "It is our position, notwithstanding [a collective bargaining agreement to the contrary], that an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requsted without the use of the

> employee's services. The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive."

Id. at 1036.

An agency's opinion letter interpreting a statute "do[es] not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Instead, "interpretations contained in . . . opinion letters are 'entitled to respect' under . . . *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *Id.* "The weight accorded to an administrative [opinion letter] will depend upon the throughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *United States v. Mead*, 533 U.S. 218, 228 (2001). Those factors reveal that the agency's opinion letter and amicus brief are unpersuasive in their interpretation of the meaning of "reasonable period" in § 207(o)(5).

The Secretary concludes in the opinion letter that, notwithstanding a collective bargaining agreement to the contrary, an agency may not turn down a request from an employee for compensatory time off unless it would be unduly disruptive under the Act. But § 207(o) allows a public agency to reach agreements on CTO with its employees' representative. In addition, "the legislative history [of the FLSA] suggests that employers and employees are required to negotiate and reach agreements over the use and preservation of [CTO]." *Collins v. Lobdell*, 188 F.3d 1124, 1130 (9th Cir. 1999).

> Furthermore, in the comments to the final version of 29 C.F.R. § 553.25, the Department of Labor stated that:
>
> "The Department believes . . . that some parties may choose to include in their agreement or understanding the conditions or terms regarding the taking of compensatory time off. No useful purpose would be served, in the Department's view, by providing for some further review under the FLSA of the appropriateness of the agreed upon terms."

Aiken, 190 F.3d at 757 (*quoting* 52 Fed. Reg. 112017 (1987). 29 C.F.R. § 553.23(a)(1) also recognizes that CBAs can reflect an "understanding or . . . agreement between [a] public agency and representatives of [public] employees [about the use of CTO]."

Moreover, the *DeBraska* court found that the absence of the meaning of "reasonable period" in the collective bargaining agreement before it was a point that distinguished *DeBraska* from *Aiken*, stating it "was crucial in *Aiken*—that the defendant and the plaintiffs had agreed to a definition of the term "reasonable period" that absolved the defendant of liability—[which was not the situation in *DeBraska*]." *DeBraska*, 131 F. Supp. 2d at 1036.

In the case sub judice the CBA does not contain the term "reasonable period," but provides: "[CTO] shall be used within one year from the time overtime was performed. If [the County] is unable to schedule and grant the [CTO] within one year, cash payment shall be made in lieu of [CTO]." Even if these CBA clauses are ambiguous when considered in light of statutory language in § 207(o)(5), "it has long been a rule of labor contract interpretation that ambiguous clauses in collective bargaining agreements should be interpreted in a manner which renders them lawful, if at all possible." *National Labor Relations Board v. Manitowoc Engineering Co.*, 909 F.2d 963, 968 (7th Cir. 1990).

The collective bargaining agreement states the right and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. As one observer has put it: "[T]he governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words."

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces. The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave

> problems to future consideration with an expression of hope and good faith." *Shulman, [Reason, Contract, and Law in Labor Relations*, 68 Harv.L.Rev. 999] *supra*, at 1005. Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators.

United Steel Workers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 578-81 (1960).

The parties revealed at oral argument on the motions that a particular CTO leave book practice, which has been in existence for years, underlies their CBA clauses concerning CTO. Pursuant to that practice, the County provides either three or four CTO leave slots for scheduling CTO each day, and allows employees, within the one year period, to request the use of CTO up to sixty days in advance. The practice prevents a deputy sheriff from requesting a CTO slot more than sixty days in advance of the requested CTO date, but the request will be granted unless no CTO leave slot is available on that date. This practice is consistent with the Secretary's regulation, located at 29 C.F.R. § 553.25(c)(1), which provides factors to consider when applying the "reasonable period" term in § 207(o)(5) and which reveals in pertinent part: "Whether a request to use [CTO] has been granted within a 'reasonable period' will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case."

Since no genuine issue of material fact exists concerning the CBA allowing the County to schedule CTO "within one year from the time overtime was performed," and as the County's customary leave practice is "entirely compatible with § 207(o)(5)," the County prevails on its motion. *Christensen*, 529 U.S. at 585.

CONCLUSION

For the reasons stated, Mortensen's motion for summary judgment is denied. The County's motion for summary judgment is granted. The Clerk of the Court is directed to enter judgment for Defendant.

IT IS SO ORDERED.

DATED: January 15, 2003

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

[Filed January 16, 2003]

RONALD MORTENSEN

v.

COUNTY OF SACRAMENTO

Case Number: CIV S-01-0782 GEB DAD

XX—Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN FAVOR OF DEFENDANT IN ACCORDANCE WITH THE COURT'S ORDER OF JANUARY 16, 2003.

Jack L. Wagner,
Clerk of the Court

ENTERED: January 16, 2003

by: /s/ D. Waggoner, Deputy Clerk
D. Waggoner

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT
Eastern District

[Filed Jan. 28, 2003]

CIV S-01-0782 GEB DAD
Judge: Garland E. Burrell, Jr.

RONALD MORTENSEN,
Plaintiff,

vs.

COUNTY OF SACRAMENTO,
Defendant.

Is this a cross-appeal? NO

If this matter has been before this court previously, please provide the docket number and citation (if any): N/A

Brief Description of nature of action and result below: SEE ATTACHMENT "A"

Principal issues proposed to be raised on appeal: SEE ATTACHMENT "A"

Please identify any other legal proceeding that may have a bearing on this case (including pending District Court post-judgment motions):

Does this appeal involve any of the following: NO

☐ Possibility of settlement.

☐ Likelihood that intervening precedent will control outcome of appeal.

- ☐ Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (Specify)_____.
- ☐ Any other information relevant to the inclusion of this case in the Mediation Program _____.
- ☐ Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges.

ATTACHMENT "A"

BRIEF DESCRIPTION OF ACTION AND RESULT BELOW:

The Fair Labor Standards Act ("FLSA") provides peace officer employers the option to either pay overtime or permit employees to take Compensatory Time Off ("CTO"). The County of Sacramento ("County") and the Sacramento County Deputy Sheriff's Association ("SCDSA") agreed to the adoption of CTO in the relevant Memorandum of Understanding ("MOU"), but did not negotiate the terms of use. The FLSA mandates a public employer allow CTO use where requested within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency. The County denied Ronald Mortensen's CTO use based upon a policy whereby CTO requests are granted only if an arbitrarily determined number of slots are available in the "leave book". The leave book slots are calculated to avoid paying overtime to another Deputy Sheriff to work the shift. The facts show Ronald Mortensen request use of his CTO within a reasonable period and the use would not have caused an undue disruption. Plaintiff requested the USDC for the Eastern District of California issue forth summary judgment or alternatively summary adjudication on all causes of action in favor of Plaintiff. The Honorable Garland E. Burrell, Jr. denied Ronald Mortensen's motion for summary judgment and granted the County's concurrently filed motion for summary judgment.

PRINCIPAL ISSUES PROPOSED TO BE RAISE ON APPEAL:

This appeal focuses upon:

(1) The definitions of "unduly disrupt" and "reasonable period" as set forth in 29 USC § 207(o)(5), which states

> An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—
>
> (A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
>
> (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(2) Whether the holding in *DeBraska v. City of Milwaukee* (2000) 131 F.Supp.2d 1032 was properly ignored by the Eastern District under *Christensen v. Harris County* (2000) 529 U.S. 576 or should have been followed pursuant to *Auer* v. *Robbins* (1997) 519 U.S. 452; and

(3) Whether a CTO "cash out" provision of the MOU may be interpreted to operate as a "use" provision, when no clear "use" provision was negotiated regarding CTO.

JURISDICTION

FEDERAL

☒ Federal Question
☐ Diversity
☐ Other (Specify):

APPELLATE

☒ Final Decision of District Court
☐ Interlocutory Decision Appealable As of Right
☐ Interlocutory Order Certified by District Judge (Specify):
☐ Other (Specify):

DISTRICT COURT DISPOSITION

TYPE OF JUDGMENT/ORDER APPEALED

☐ Default Judgment
☐ Dismissal/jurisdiction
☐ Dismissal/merits
☒ Summary Judgment
☐ Judgment/court Decision
☐ Judgment/jury Verdict
☐ Declaratory Judgment
☐ Judgment as a Matter of Law
☐ Other (Specify):

RELIEF

☐ Damages:
Sought $____ Awarded $____
☒ Injunctions:
☒ Preliminary
☒ Permanent
☐ Granted
☒ Denied
☐ Attorney Fees:
Sought $____ Awarded $__☐__ Pending:
☐ Costs: $____

CERTIFICATION OF COUNSEL

I CERTIFY THAT:

1. Copies of Order/Judgment Appealed Form Are Attached.

2. A Current Service List or Representation Statement With Telephone and Fax Numbers Are Attached (See 9th Cir. Rule 3-2).

3. A Copy of This Civil Appeals Docketing Statement Was Served in Compliance with FRAP 25.

4. I Understand That Failure to Comply With These Filing Requirements May Result in Sanctions Including Dismissal of This Appeal.

/s/ Adam J. Krolikowski — 1/28/03
Signature — Date

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